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No. 95-232

In the Supreme Court of the United States

OCTOBER TERM, 1995

LLOYD HENDERSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

The Suits in Admiralty Act, 46 U.S.C. App. 741 *et seq.*, provides for suits in admiralty against vessels or cargoes of the United States. Section 2 of that Act states that "[t]he libelant shall forthwith serve a copy of his libel on the United States attorney for such district and mail a copy thereof by registered mail to the Attorney General of the United States." 46 U.S.C. App. 742. The question presented in this case is whether compliance with the requirement that the complaint be served "forthwith" is a jurisdictional condition on the statutory waiver of sovereign immunity.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-7) is reported at 51 F.3d 574. The order of the district court (Pet. App. 8-9) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 10, 1995. The petition for a writ of certiorari was filed on August 8, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner filed a seaman's personal injury action against the United States on April 8, 1993, under the Suits in Admiralty Act (SAA), 46 U.S.C. App. 741 *et seq.*, and the Public Vessels Act (PVA), 46 U.S.C. App. 781 *et seq.* Pet. App. 2. Section 2 of the SAA provides, in pertinent part, that "[t]he libelant shall forthwith serve a copy of his libel on the United States attorney for such district and mail a copy thereof by registered mail to the Attorney General of the United States." 46 U.S.C. App. 742. That requirement is also applicable to petitioner's PVA action, because of the PVA's requirement that suits under that Act "shall be subject to and proceed in accordance with the provisions of" the SAA. 46 U.S.C. App. 782.

On May 25, 1993, 47 days after the filing of petitioner's complaint, the Attorney General received a copy of the complaint by mail. On August 30, 1993, 144 days after filing his complaint, petitioner filed a motion for postponement in the district court, in which he claimed to have been unable to complete service on the appropriate United States Attorney due to difficulties with the mail. The court granted petitioner 15 days to complete service, and the United States Attorney was served on September 3, 1993, 148 days after petitioner filed suit. The United States moved to dismiss the action, arguing that petitioner's failure to effect service of process "forthwith," as required by the SAA, deprived the court of subject-matter jurisdiction. The district court denied the motion without opinion. Pet. App. 2.

After the district court denied the motion, the Fifth Circuit issued its opinion in *United States* v. *Holmberg*, 19 F.3d 1062, cert. denied, 115 S. Ct. 482 (1994). The court in *Holmberg* held that the SAA's waiver of sovereign immunity is conditioned upon the plaintiff's compliance with 46 U.S.C. App. 742. See 19 F.3d at 1064. Because "[c]onditions to a waiver of sovereign immunity are necessarily jurisdictional in nature," *ibid.*, a plaintiff's failure to effect service of a complaint upon the government "forthwith," as required by Section 742, deprives the district court of jurisdiction over his claim, *id.* at 1065. The *Holmberg* court held as well that Section 742 "involves substantive rights because it defines the scope of the Government's consent to be sued," and that its requirements therefore cannot be modified by Federal Rule of Civil Procedure 4(j) (1993). 19 F.3d at 1065.[1] The court "agree[d] that there has been no uniform definition of forthwith" but concluded that, "under any definition, service in 103 or 106 days" would not satisfy the requirements of Section 742. *Ibid.* In light of the Fifth Circuit's decision in *Holmberg*, the district court in the instant case reconsidered its

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[1] At the time petitioner filed his complaint, Rule 4(j) provided as follows:

> If a service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant without prejudice upon the court's own initiative with notice to such party or upon motion. This subdivision shall not apply to service in a foreign country pursuant to subdivision (i) of this rule.

In 1993, Rule 4(j) was renumbered 4(m) and was amended in respects not relevant to this case.

ruling and dismissed petitioner's complaint without prejudice for lack of subject-matter jurisdiction. Pet. App. 2.

2. The court of appeals affirmed. Pet. App. 1-7. The court held that, because the requirements of Section 742 are jurisdictional, the district court's decision to grant petitioner a 15-day extension to serve his complaint "did not affect either the court's subject-matter jurisdiction or [petitioner's] obligations under § 742." *Id.* at 5-6. Relying on *Holmberg*, the court held that petitioner, who had served his complaint on the United States Attorney 148 days after it was filed, could not be said to have effected service "forthwith." *Id.* at 6. Finally, the court held that the word "forthwith" in Section 742 "applies both to the service of a copy of the complaint on the United States Attorney and to the mailing of a copy of the complaint by registered mail to the Attorney General of the United States." *Id.* at 7. The court declined, however, to decide whether service of the complaint on the Attorney General (47 days after its filing) had been effected "forthwith," since service upon the Attorney General alone could not suffice to satisfy the requirements of Section 742. *Ibid.*[2]

[2] The court of appeals declined to address petitioner's contention that the dismissal of his complaint violated due process. The court explained that "the district court dismissed his complaint without prejudice, and [petitioner] [did] not argue that a subsequent suit would be time-barred." Pet. App. 3 n.1. Petitioner does not pursue his due process claim in this Court. See Pet. i.

ARGUMENT

1. This Court has held that the terms of consent contained in a statutory waiver of sovereign immunity define a court's jurisdiction, *United States* v. *Mitchell*, 445 U.S. 535, 538 (1980), and that the Federal Rules of Civil Procedure cannot relax the jurisdictional conditions placed on such a waiver, *United States* v. *Sherwood*, 312 U.S. 584, 589-590 (1941). The court of appeals adhered to that principle in the instant case. The requirement that service of the complaint upon the government be effected "forthwith" is an express statutory condition on the SAA's waiver of sovereign immunity; the Federal Rules of Civil Procedure may "not abridge, enlarge or modify" that condition. 28 U.S.C. 2072(b). See also *Libby* v. *United States*, 840 F.2d 818, 821 (11th Cir. 1988).[3] The court of appeals' decision is in accord with rulings of the Second, Ninth, and Eleventh Circuits, the other circuits that hear the vast majority of admiralty cases and the only other circuits to rule on the question. See, *e.g.*, *Libby*, 840 F.2d at 819-821; *Amella* v. *United States*, 732 F.2d 711, 713 (9th Cir. 1984); *Kenyon* v. *United States*, 676 F.2d 1229, 1231 (9th Cir.

[3] The SAA's waiver of sovereign immunity is in Section 742, as is the requirement that service upon the government be effected "forthwith." The procedural requirements for an action under the SAA, however, are in Section 743. See 46 U.S.C. App. 742 and 743. The structure of the statute supports the conclusion that Section 742 is not simply procedural, but is a substantive provision that former Rule 4(j) could not alter. See, *e.g.*, *Holmberg*, 19 F.3d at 1064-1065; *Libby*, 840 F.2d at 820.

1981); *Battaglia* v. *United States*, 303 F.2d 683, 685-686 (2d Cir.), cert. dismissed, 371 U.S. 907 (1962).[4]

This Court recently denied the petition for certiorari in *Holmberg*, which raised the same question as is presented in the instant case. Contrary to petitioner's submission (see Pet. 6-7), the decision below does not conflict with the Third Circuit's holding in *Jones & Laughlin Steel, Inc.* v. *Mon River Towing, Inc.*, 772 F.2d 62 (3d Cir. 1985). In *Jones & Laughlin Steel*, the Third Circuit held that it lacked jurisdiction under the SAA and that jurisdiction existed only under the Federal Tort Claims Act. *Id.* at 64-65. The court's statement that "the [SAA's] requirement of forthwith service of process is not jurisdictional but rather is procedural," *id.* at 66, was dictum.

Petitioner contends (Pet. 7-9) that the 1966 amendments to the Federal Rules of Civil Procedure, which broadly unified admiralty procedure with the rules of procedure in civil cases, were intended to supplant existing service requirements in admiralty proceedings with a uniform 120-day period provided under the Federal Rules. As a condition of the government's waiver of sovereign immunity, however, Section 742 is a substantive limitation on the courts' jurisdiction that cannot be modified by the Federal Rules of Civil Procedure. *Sherwood*, 312 U.S. at 589-590.

2. Petitioner suggests that the term "forthwith" should be defined as 120 days, the service requirement in Rule 4(j). Pet. 15-17. This Court has held, however, that an undefined term found in a statute should

[4] Petitioner relies (see Pet. 6-7) on earlier district court decisions from within the Fifth and Eleventh Circuits.

be construed in accordance with its ordinary, natural, and plain meaning. *Smith* v. *United States*, 113 S. Ct. 2050, 2054 (1993); *Caminetti* v. *United States*, 242 U.S. 470, 485-486 (1917). "'Forthwith' connotes action which is immediate, without delay, prompt, and with reasonable dispatch." *Amella*, 732 F.2d at 713, citing *Black's Law Dictionary* 588 (5th ed. 1979); accord *Libby*, 840 F.2d at 821; *City of New York* v. *McAllister Bros.*, 278 F.2d 708, 710 (2d Cir. 1960). Indeed, this Court has determined that "forthwith" "[i]n matters of practice and pleading * * * is usually construed, and sometimes defined by rule of court, as within twenty-four hours." *Dickerman* v. *Northern Trust Co.*, 176 U.S. 181, 193 (1900). In contrast, former Rule 4(j) "set[] 120 days as a presumption of unreasonable and dilatory delay in service of the complaint in any civil suit." *Amella*, 732 F.2d at 713. The Rule 4 benchmark for unreasonable delay is not an appropriate test for determining whether service has been effected "forthwith." *Holmberg*, 19 F.3d at 1065.

3. Finally, petitioner argues that the Fifth Circuit's interpretation of Section 742 places unwarranted restrictions on the district courts' power to extend the time for service of process. Pet. 17-19. Petitioner notes that this Court has applied equitable tolling rules to federal statutes of limitation, and he asserts that a federal court should similarly possess the power to extend the time for service of process when the court deems it appropriate. The tolling principles applicable to statutes of limitations governing other causes of action, however, are of little relevance in construing the SAA's requirement that service of process be effected "forthwith."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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